United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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74-1603

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- WINCEL HENDRIX, Appellant.	Docket No. 74-1603

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC

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On October 15, 1974, this Court (The Honorable James L. Oakes, C.J.; The Honorable Marvin E. Frankel and The Honorable Robert Keleher, D.JJ.) affirmed appellant's conviction and sentence for possessing with intent to distribute cocaine and marijuana, holding, inter alia, that the District Court judge acted properly within his discretion when he imposed an additional two years' imprisonment as punishment for appellant's alleged perjury at trial.

This decision, one of first impression in this Circuit, is of critical significance to sentencing and trial strategy.

The Court's misinterpretation of undisputed facts and the impact of this decision require that the application for rehearing with suggestion for rehearing en banc be granted.

I

The panel decision held that the District Judge's belief beyond a reasonable doubt that a defendant had perjured himself at his trial was a factor to be considered in evaluating the defendant's character and the sentence to be imposed. Whatever the validity of that principle, the panel was incorrect when it assumed that the District Judge applied it in this case. No such application was made. Rather, what Judge Mishler did was to expressly impose two years of the sentence because he believed that appellant committed perjury, explaining that he would not allow perjury by a defendant at trial to go unpunished. Specifically, Judge Mishler said:

> I think defendants should be encouraged to take the witness stand but when they take the witness stand I think they must understand that there is a certain risk they take, they better tell the truth.
>
> I feel I added about two years for perjury during the trial in my sentence.
>
> United States v. Hendrix, Doc. No. 74-1603, slip op. at (2d Cir., October 15, 1974).

The unequivocal import of this statement is that appel-

lant received a two-year sentence as punishment for what the Judge determined to be perjurious testimony. Nowhere does the Judge indicate that the alleged perjury was an element in his evaluation of appellant's character for purposes of sentence, and no such analysis can be inferred from this record. A specific two-year sentence was improperly imposed for the uncharged and untried crime of perjury. Had the allegation of perjury been utilized to individualize the punishment for illegal possession of drugs, no portion of the sentence would be severable, as it is here, from the overall term of imprisonment.

Therefore, whatever the validity of the panel's opinion concerning the relevance of a finding of perjury as an indicator of character, that logic and the cases cited therein are inapposite here.*

II

The panel opinion establishes that a sentencing judge's belief beyond a reasonable doubt that a defendant perjured himself was a factor to use in determining whether the defendant's character necessitated a more severe sentence than would

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*Unlike United States v. Collins, 462 F.2d 792 (2d Cir. 1972), in this case there is no disputed question of basic fact since the facts are discernible from the transcript. What is at issue here is the legal implication of the District Judge's clear, unambiguous language.

otherwise be imposed. However, the opinion provided no mechanism for determining whether the district judge considered perjury as a factor or followed the standard. It imposed no requirement of an express statement by the judge that he considered his belief that the defendant perjured himself, or that he believed that beyond a reasonable doubt. Without such a statement, trial counsel for the defendant has no way of refuting that finding or belief. Since counsel has no other opportunity to challenge that finding (see infra, Point III), the failure to give the defense an opportunity to refute a finding of perjurious conduct at sentencing creates a substantial risk that the district judge will premise his sentence, at least in part, on an erroneous determination, in violation of due process. United States v. Malcolm, 432 F.2d 809, 819 (2d Cir. 1970). This runs counter to the entire theory for permitting counsel to examine the presentence report and to make corrections.

The opinion of the panel assumes with some caveat* that trial judges are "sophisticated and experienced enough to know that the convicted defendant who took the stand is not ipso facto a perjurer. This appraisal of district judges is laudable, but those judges are not clairvoyant and cannot validly determine the relevant facts unless defense counsel is enabled to know and comment on his findings.

The opinion also fails to require that the judge state that he considered this perjurious conduct as an element in determining

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*The court, recognizing reality, refuses to assume that all judges are capable of this feat or that judges are capable all the time.

the defendant's character. Thus, counsel is precluded from attacking the unwarranted, unsupported, and questionable assumption expressed in the opinion that the defendant's illegal perjurious behavior at trial is symptomatic of his general character.* Counsel is precluded from directing his argument to the point that his client's courtroom attitude is not representative. Moreover, the failure to require a statement precludes the appellate court from determining whether the judge's belief was beyond a reasonable doubt and whether it was used only as an aid to determining character, as the panel decision requires.**

III

The Court's opinion acknowledges the "danger ... that defendants may be caused unduly to refrain from testifying because of fear that the jury's or the judge's disbelief will automatically lead to an increased sentence." Slip op. at 5810. Attempting to eliminate this danger, the Court has created what amounts to a summary proceeding by which the trial judge may increase the sentence being imposed if he finds "beyond a reasonable doubt" that the defendant committed perjury.

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*It cannot be doubted that a criminal trial is a unique situation, exposing a defendant to extreme tension and pressure. The Court's conclusion that an individual's behavior in such circumstances is representative cannot be assumed as a matter of law without some supporting evidence from authorities on human behavior.

**This "procedural" review is in accord with principles limiting review of sentence.

The adoption by this Court of such a procedure will certainly discourage a defendant from taking the witness stand in his own defense, thereby aggravating the chilling effect the Court expressly seeks to diminsh. As the court found in Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969):

> ... In [testifying in his own behalf, a defendant] risks the jury's disbelief. If he in fact fails to convince the jurors, conviction and punishment will follow. If the Government, for whatever reasons, concludes that prosecution for perjury is appropriate, he risks punishment for that as well. To allow the trial judge to impose still further punishment because he too disbelieves the defendant would needless discourage the accused from testifying in his own behalf.

Moreover, the summary procedure extablished by this Court does not provide a sufficiently reliable conclusion of perjurious conduct to support enhancement of sentence. Contrary to this Court's holding, the mere fact that the jury disbelieved the defendant's testimony in this case does not mean that it found him guilty of willful and knowing perjury. At worst, the jury's finding of guilt would indicate its disbelief of the defendant's trial testimony. In addition to misrepresentation, however, the offense of perjury also requires proof beyond a reasonable doubt of the elements of willfulness and knowledge. The jury, of course, was not instructed in this case to consider such elements, and the verdict can in no way be interpreted as a finding that such elements existed. Similarly, the Judge, even though apparently concluding that the defendant's testimony was not believable, heard no evidence of the

other elements of the offense, and permitted the defendant no opportunity whatsoever to present a defense to the charge of perjury. Thus, his summary determination that the defendant committed perjury "beyond a reasonable doubt" is too unreliable to support a two-year enhancement of sentence.

Finally, the adoption of this procedure for the determination of perjury amounts to an unconstitutional by-pass of the notice and hearing to which every criminal defendant is entitled before he can be punished for such an offense. Scott v. United States, supra, 419 F.2d at 268-69. This Court itself, in the process of adopting this summary procedure, acknowledged that in cases where the judge cannot conclude beyond a reasonable doubt that the defendant has committed perjury "the evidence of false trial testimony should be bypassed for sentencing purposes and left to the United States Attorney for possible prosecution." Slip op. at 5811. However, even in those cases where the judge has formed the opinion that beyond a reasonable doubt the defendant had committed perjury, constitutional requirements cannot be ignored. Any perjury believed to have been committed by a defendant during his trial is properly punishable as a separate criminal proceeding. United States v. Williams, 341 U.S. 48 (1951); 18 U.S.C. §1621. Consequently, the summary determination by the trial judge in this case that Mr. Hendrix was guilty of this crime constituted a denial of his Sixth Amendment right not to be deprived of his liberty without due process of law, and of the other consti-

tutional safeguards of the criminal process, including an indictment and trial with jury. Mr. Hendrix was entitled to these guaranteed rights before he could lawfully be convicted and sentenced for the crime of perjury.

CONCLUSION

For the above stated reasons, the petition should be granted and the opinion of the Court vacated or modified.

Respectfully submitted,

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Certificate of Service

October 29, 1974

I certify that a copy of this petition for rehearing with suggestion for rehearing en banc has been mailed to the United States Attorney for the Eastern District of New York.